IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.601 OF 2007
IN
SUIT NO.3505 OF 1998

1.Ishaq Yusuf
2.Shoaib Haji Abdul Rahim
3.Farooq Sharif Patel
carrying on business at
Everjoy Apartment, Shop Nos.1 to 3,
Marol Village, Andheri (East),
Mumbai 400 057 ...Plaintiffs

vs.

1.Abbas Peer Mohamed
Gulshan Co-Op Housing Soc.Ltd.
Building No.C-1, Flat No.7,
Andheri Versova Yari Road,
Mumbai 400 060

2. Jabir Habib Jagrala
Room No.4, Siddheshwar Chawl,
Near Lok Chamber, Opp.Anjali Gas,
Marol Maroshi Road, Marol village,
Mumbaik 400 059 ...Defendants

Mr.Anil C.Singh i/b Mr.D.R.Shah for the Plaintiffs
Mr.A.K.Abhyankar, Sr.Advocate with Atul Damle i/b Ms Sangeeta Patil for Defendant No.2

CORAM: A.S.OKA,J.
DATE : SEPTEMBER 19,2007

P.C.:

1. The submissions of the learned counsel for the parties were heard on the last two dates and today the notice of motion is kept for dictation of the order. The notice of motion has been taken out by the plaintiffs praying that they may be appointed as an agent of the Court Receiver in respect of the property, assets and belongings of the suit firm

described in Exh.B to the plaint without security and/or on such terms and conditions as the court may deem fit. The second prayer is for direction to the Court Receiver to pay to the plaintiffs the entire amount lying with the office of the Court Receiver deposited by the first and second Defendants.

2. The suit is filed by the plaintiffs for declaration that the suit partnership firm by the name "M/s.Cafe Marol" between the plaintiffs and the first defendant under the partnership deed dated 25th April 1995 be dissolved from July 1998 or from he date of filing of the suit or from such other date as this court may fix. The prayer is also made for winding up of the business of the firm.

3. According to the case of the plaintiffs they along with the first defendant are partners of the firm viz. Cafe Marol (hereinafter referred to as the said firm). As per the partnership deed, the shares of the partners in the profit and loss are as under :

Plaintiff no.1 35%
Plaintiff No.2 40%
Plaintiff No.3 5%
Defendant No. 1 20%

According to the case of the plaintiffs, the assets of the

partnership firm consists of shop No.1 to 3 in Everjoy Apartment, Marol,Andheri (E), Mumbai, godowns located on the rear side of the said shops taken on lease in the name of the father of the second plaintiff, goodwill of the business of the said firm as well as furniture an fixtures and stock in trade of the said business. It is stated that the business of the said firm was carried out jointly by the plaintiffs and first defendant since April 1995. According to the case of the plaintiffs in the year 1997, the first defendant tried to exclude and prevent the plaintiffs from carrying on partnership business. It is alleged that the defendant No.1 engaged hirelings to threaten the plaintiffs. Therefore, the plaintiffs were compelled to file a civil suit against the first defendant for injunction. In the said suit that a notice of motion for injunction was taken out by the plaintiffs. In the reply by the first defendant to the said notice of motion, a contention was raised by the first defendant that the business premises in which the business of Cafe Marol was conducted have been given on rent in favour of the second defendant in January 1998 at monthly rent of Rs.7,000/- and since then the second defendant is carrying on the business of Cafe Marol as a tenant. It is stated that the second defendant has filed a suit in the Court of Small Causes, Bandra, Mumbai for declaration and injunction in which the temporary injunction has been granted restraining the partnership firm from disturbing the possession of the second

defendant.

4. It is the case made out by the plaintiffs that since June 1996, the second defendant was working as a Cashier/Manager of the Restaurant and was coming to the suit premises as an employee of the partnership firm. It is contended that the claim of tenancy of is utterly false and frivolous. It is submitted that the suit filed by the second defendant is in collusion between the second defendant and the first defendant. It is alleged that the summons of the said suit was served to the first defendant who purported to represent the said firm on behalf of the plaintiffs without knowledge of the plaintiffs. It is submitted that the first defendant had no right or authority to deal with the assets of the partnership firm without permission of the plaintiffs. Reference is made in the plaint to registration of the F.I.R. as a result of alleged assault committed by the hirelings of the defendant No.1. By Advocates letter dated 28th July 1998 the plaintiffs dissolved the said firm.

5. A notice of motion being notice of Motion No.2729 of 1998 was filed by the plaintiffs for grant of interim relief. On 25th August 1998 this court granted an ad-interim relief on the said notice of motion by which the Court Receiver, High Court, Mumbai was appointed as a Receiver of the assets of the said firm and the second defendant was appointed as an agent

of the Court Receiver upon such terms and conditions, royalty and security as the Court Receiver may deem fit. By order dated 28th August 2000, the said notice of motion was finally disposed of by this court relying upon the order of injunction granted by the Court of Small Causes, Mumbai in favour of the second defendant and confirmation the ad-interim order passed earlier. This Court granted a liberty to the plaintiffs to reapply in the event the court of Small Causes or the Appeal Bench of the said Court reverses the order of temporary injunction passed in favour of the second defendant.

6. The present notice of motion has been taken out in terms of the liberty granted by the aforesaid order dated 28th August 2000. It is stated that the order of temporary injunction granted by the Court of Small Causes by order dated 10th March 2000 has been vacated by the Appeal Bench of the said court by its order dated 30th September 2002 and order of the Appeal bench has been confirmed by this Court.

7. The learned counsel for the plaintiffs in support of the notice of motion invited my attention to the various orders passed by the Court of Small Causes as well as this court. He submitted that the order of temporary injunction passed by the Court of Small Causes in favour of the second defendant has been vacated by the Appeal bench of the said Court by observing that the first defendant colluded with the second

defendant and issued rent receipts to the second defendant and that is how the second defendant succeeded in getting the order of injunction. He pointed out that the plaintiffs were having 80% of the shares in the profit and loss of the firm. The second defendant was appointed as an agent of the Court Receiver only on the basis of the interim protection granted in his favour by the Court of Small Causes. He submitted that once the order of injunction is vacated, the second defendant is not entitled to continue as an agent of the Court Receiver. He submitted that as of today the second defendant was appointed as an agent only on the basis of the order of injunction passed by the court of Small Causes and once the said order is vacated, the plaintiffs who are having 80% shares in the suit property deserve to be appointed as agents of the Court Receiver. The learned Senior Counsel for the second defendant submitted that the suit for declaration by the second defendant in the Competent court i.e. the Court of Small Causes is still pending. He submitted that no steps have been taken by the plaintiffs or the said firm to evict the second defendant from the suit property by filing the appropriate proceedings. He submitted that the second defendant was appointed as an agent of the Court Receiver as he was found to be in possession of the business. He submitted that so long as the declaratory suit filed by the second defendant is not decided, the appointment of the second defendant cannot be cancelled. He submitted that the first

defendant had an authority to induct the second defendant as a tenant. He invited my attention to the relevant clauses the partnership deed. Lastly, he relied upon the decision of the Apex court in case of Anthony C. Leo Vs. Nandlal Bal Krishnan and others (A.I.R. 1997 S.C. page 173) and submitted that the Court Receiver cannot be ordered to dispossess the second defendant as the second defendant is claiming to be a tenant in respect of the premises to which relevant rent control legislation is applicable. He submitted that in view of the law laid down by the Apex Court, the second defendant can be evicted only in accordance with law. He cannot be replaced as an agent of the Court receiver by the plaintiffs which will have an effect of dispossessing him.

8. I have carefully considered the submissions. It will be necessary to refer the various orders passed by this court in the present suit. In ad-interim order dated 25th August 1998, this court has referred to the fact that the plaintiffs are having 80% share in the suit property and the first defendant is having 20% share. It is noted in the said order that the second defendant has filed a suit in the court of Small Causes seeking declaration of tenancy to which the first defendant has submitted to the order and an injunction has been granted in favour of the second defendant. It is stated that an application has been filed by the plaintiffs in the said suit for setting aside the order of injunction. The learned Judge

noted the submission that the tenancy allegedly created by the first defendant in favour of the second defendant is not valid. The learned Judge observed that this aspect will have to be considered at the time of hearing of the notice of motion. Therefore, the learned Judge appointed the Court Receiver and directed that the second defendant should be appointed as an agent of the Court Receiver.

9. The notice of motion was finally disposed of by this court by order dated 28th August 2000. The paragraphs 2 and 3 of the said order read thus :

"(2) When the Notice of Motion comes up for hearing, on behalf of the Plaintiffs, it is contended that they have 80% share in the partnership whereas Defendant No.2 has only 20% share and that the purported agreement has been created by Defendant No.1 with Defendant No.2 without the authority of law. It is also contended that the proceedings before the Small Causes Court are conclusive proceedings. That is immaterial as of today there is an order of the Court in favour of the defendant No.2. Until the order is set aside the possession of the Defendant No.2 cannot be interfered with. In that context, the appointment of the Defendant No.2 as Agent of the receiver cannot be faulted with. Consequently, the Notice of Motion will have to be made absolute in

terms of order of this Court dated 25th August 1998.

(3) However, liberty to the Plaintiffs to reapply in the event the Court of the Small Causes Court at Mumbai or the Appellate Court reverses the order passed in favour of the Defendant No.2."

10. Thus, this court observed that notwithstanding the fact that the plaintiffs are having 80% share in the partnership, as there was an order of injunction of the court of Small Causes in favour of the second defendant which was not set aside, the possession of the second defendant cannot be interfered with. Therefore, this court granted a specific liberty to the plaintiffs in the event the court of Small Causes reversing the order passed in favour of the second defendant. The aforesaid decision of this court has attained finality.

11. In the declaratory suit filed by the second defendant he had applied by way of interim notice for grant of temporary injunction. By order dated 31st March 1998 the Court of Small Causes granted temporary injunction. It must be noted here that in the cause title of the said suit filed by the second defendant, the said firm was joined as a defendant through its partner Shri Abbas (the first defendant herein). In paragraph

7 of the said Judgment and Order, the learned Judge of the Court of Small Causes has recorded that the partner of the defendant firm (the first defendant herein) has admitted that he went to the plaintiff in the said suit and asked him to vacate the said premises. The learned Judge has referred to the statement made on 5th March 1998 by the first defendant herein in the suit filed before the court of Small Causes. The learned Judge granted injunction restraining the firm from disturbing the possession of the second defendant herein without following due process of law. It must be noted here that the present plaintiffs applied to the Court of Small Causes for impleading themselves as the party defendants and they also applied for vacating the order of injunction. The prayer for impleading them as parties was granted. However, the prayer for vacating injunction was rejected. An Appeal was preferred by the present plaintiffs. The Appeal Bench of the Small Causes court allowed the said Appeal by order dated 30th September 2002 and vacated the injunction granted by the court of Small Causes in favour of the second defendant. It will be necessary to refer to the prima facie findings recorded by the Appeal Bench of the said Court in paragraph 19 of its Judgment. The Appeal Bench observed thus :

"19...However, we find that the Trial Court merely on the basis of the statement of the fourth partner made notice absolute."

In paragraph 20 the Appeal Bench referred to the documents produced by the plaintiffs through its witness. The said documents were filed by the firm. While referring to the said documents the Appeal Bench observed thus :

"20...We have gone through the returns produced by the said witness before the trial Court and we find that these returns for the period for 1996 to 1998 in which the name of witness Mr.Jabbir is shown as employee of the defendants' firm."

In paragraph 21 the Appeal Bench referred to ESIC Challans produced by the plaintiffs in the present suit which show that the second defendant herein was their employee. In the light of the said documents produced, the Appeal Bench has observed thus :

21...It was incumbent upon the plaintiff even at that time to produce additional documentary evidence, if any, to establish and prove his case regarding exclusive possession as a tenant. However, we find that no such steps were taken to produce other relevant documents such as Shops and Establishment licence etc."

. The Appeal Bench further observed in paragraph 24 as under:

". As against this we hold that these respondents, the three

other partners as per their case that the plaintiff was their employee, by issuing the witness summons to the B.S.I.C. The witness got produced the necessary returns showing the name of the plaintiff as their employee and primafacie proved their case."

Ultimately, the Appeal Bench came to the following conclusion:

"....As discussed above, we hold the respondent, three other partners have primafacie proved their case that the fourth partner Mr.Abbas Peermohamed indeed colluded with the plaintiff in whose favour he has issued some rent receipts and on the basis of those rent receipts the plaintiff succeeded in getting the order of injunction in his favour.

12. A Writ Petition was filed by the second defendant for challenging the aforesaid Judgment of the Appeal Bench. The said writ petition has been disposed of by order dated 26th July 2006. In the said writ petition the learned Single Judge of this court observed that a statement was made by the present plaintiffs that they will not dispossess the second defendant without following due process of law but this should not be an impediment in the way of the plaintiff in this suit to apply to the Court to appoint them as the agents of the Receiver. This court observed that the plaintiffs can very well take recourse to remedies including that of moving this

court for seeking appointment as agents of the Court Receiver by removing the second defendant. The Writ Petition was disposed of without disturbing the order passed by the Appeal Bench of the Small Causes Court.

13. Therefore, as of today, there is a prima facie finding recorded by the Appeal Bench of the Small Causes Court that the plaintiffs herein have produced prima facie evidence to show that the second defendant was an employee of the suit firm. The Appeal Bench found that apart from the alleged rent receipts issued by the first defendant, no material could be produced by the second defendant to establish the tenancy. Thirdly, the Appeal Bench observed that injunction was granted in favour of the second defendant initially only on the basis of the statement made by the first defendant herein and finally the Appeal Bench of the Small Causes Court accepted the case made out by the Appellants that the first defendant colluded with the second defendant and issued some rent receipts in favour of the second defendant and on the basis of the said rent receipts issued by the first defendant, the second defendant succeeded in getting the order of injunction. On the basis of the aforesaid prima facie findings, the Appeal Bench of the Small Causes Court vacated the order of temporary injunction passed in favour of the second defendant.

14. At this stage, it will be necessary to deal with the

submission made by the learned senior counsel for the second defendant on the basis of the Judgment of the Apex Court in case of Anthony (supra). The submission of the learned counsel for the second defendant was that as the competent court under the provisions of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 was seized of the matter in a declaratory suit filed by the second defendant, a direction cannot be issued to the Court Receiver to dispossess the second defendant. In the case before the Apex Court the the Respondent and other partners of the firm had obtained a lease of plot of land from B.M.C. The said partners constructed a building on the said plot. The Appellant before the Apex Court was inducted as a tenant in respect of a room and he was running a restaurant. There was a dispute between the partners and a suit for dissolution of the partnership firm was filed by one of the partners. The Appellant who was claiming to be a tenant was not a party to the suit. In the suit filed by the partners, a Receiver was appointed of assets of the said partnership firm at the instance of the parties to the suit. The Court Receiver had submitted a report making allegations against the Appellant regarding carrying out illegal construction on the property. An order was passed by the learned Single Judge of this court on the basis of the said report of the Court Receiver. The learned Single Judge of this Court directed that the Receiver should demolish the unauthorised construction carried out by the Appellant and the

concerned authority should not give him permission to reconstruct. The said order of the learned Single Judge was challenged before the Division Bench. The Division Bench dismissed the Appeal.

15. In the context of this factual matrix, the Apex Court observed that even after appointment of the Court Receiver, the property in respect of which the Court Receiver is appointed cannot interfere with the rights of the parties as the rights and obligations of the parties in respect of the property remains unaffected. The Apex court observed that the order or direction affecting rights of a tenant protected,controlled or regulated by Rent Act should not be passed. The Apex Court in paragraph 34 of its decision observed as under :

"34. It appears to us that since the Court must be presumed to be fully unbiased in deciding the allegations of unauthorised and illegal activities of a tenant causing prejudice against the lawful owner in the matter of preservation and maintenance of the property pendente lite, the necessity of adjudication of such dispute by another Court by bringing a legal action before it, as a matter of course, is neither necessary nor expedient. It, however, should be made clear that if for the purpose of deciding the dispute of unauthorised and illegal

> activity affecting maintenance and preservation of the property in custodia legis it becomes necessary, to determine any right claimed under a statute or flowing from some action inter parte as may be pleaded and required to be decided, it is only desirable that the Court would refrain from such determination in the summary proceeding initiated before it on the complaint of the receiver or a party to the suit and the court will direct the receiver to seek adjudication of the dispute before a competent Court by bringing appropriate legal action. Save as aforesaid, it will not be correct to contend that in no case the Court exercising control and supervision of the property in suit by appointing a receiver will be incompetent even to pass direction against a third party for the purpose of preservation of the property, once such third party pleads defence in justification of his action. The question of summary adjudication by the Court appointing the receiver or relegating the receiver to a regular suit for adjudication of the dispute concerning third party will depend on the nature of the dispute and the defence claimed by the third party.

16. In the present case, the second defendant who is claiming tenancy rights in the property in respect of which the Court Receiver has been appointed is very much a party to the suit.

While confirming the order of appointing the Court Receiver, this Court noted that the appointment of the second defendant as an agent of the Court Receiver cannot be disturbed so long as the order of temporary injunction passed by the Court of the Small Causes in favour of the second defendant is not set aside. This court granted a specific liberty to the plaintiffs to apply in case the order of injunction is reversed by the said court. Now, as stated above, the order of injunction has been reversed by the Appeal Bench of the Small Causes Court by recording the abovesaid prima facie findings regarding collusion between the first and second defendant. It is a prima facie finding of the Appeal bench that the second defendant was an employee of the said firm. The Apex Court was dealing with the case where the action against the alleged tenant was sought to be taken who was not a party to the suit in which the Court Receiver was appointed. In the present case, the ad-interim and interim were passed after hearing the second defendant. Moreover, in the case before the Apex Court there does not seem to be any dispute regarding the existence of the tenancy in favour of the Appellant therein. In the present case the prima facie finding of the competent court established under the provisions of the said Act of 1947 is to contrary. The second defendant was appointed as an agent by this Court on the basis of an order of injunction in his favour. The said order is now set aside by the competent Court. For all the aforesaid

reasons, the decision of the Apex Court will not help the second defendant.

17. As stated earlier, the appointment of the second defendant was continued only on the basis of the order of temporary injunction granted by the Court of Small Causes. The said order has been set aside and the order of setting aside in injunction has not been disturbed by this Court in a Writ Petition filed by the second defendant. Admittedly, the plaintiffs are having 80% share in the partnership firm and the first defendant is having 20% share. The first defendant has not contested the present notice of motion. In view of the prima facie finding of the Appeal bench of the Small Causes Court regarding rights of the second defendant, now the second defendant cannot be continued as an agent of the Court Receiver and the present plaintiffs will have to be appointed as the agents of the Court Receiver. However, the appointment of the plaintiffs will be subject to compliance with the conditions imposed by this court while appointing the second defendant as an agent by order dated 25th August 1998. The second prayer in the notice of motion cannot be obviously granted as the main suit is still pending. Hence, the notice of motion is disposed of by passing the following order :

i) The appointment of the second defendant as an agent of the Court Receiver made under the order passed in notice

of motion no.2729 of 1997 is cancelled.

ii) The plaintiffs are hereby appointed as agents of the Court Receiver on the same terms and conditions on which the second defendant was appointed as an agent of the Court Receiver by order dated 25th August 1998.

. At this stage, the learned counsel for the second defendant prays for stay of the operation of this order. The operation of this order will remain stayed for a period of ten weeks from today.

. The Court Receiver and the parties to act upon an authenticated copy of this order.

Judge